

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KATHRYN GILBERT,

Plaintiff,

v.

KILOLO KIJAKAZI, acting
Commissioner of Social Security,

Defendant.

No. 1:20-cv-00873-GSA

**ORDER DIRECTING ENTRY OF
JUDGMENT IN FAVOR OF DEFENDANT
COMMISSIONER OF SOCIAL SECURITY
AND AGAINST PLAINTIFF**

(Doc. 21)

I. Introduction

Plaintiff Kathryn Gilbert (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying her application for disability insurance benefits pursuant to Title II of the Social Security Act. The matter is before the Court on the parties’ briefs which were submitted without oral argument to the United States Magistrate Judge.¹ Docs. 21, 26, 27. After reviewing the record the Court finds that substantial evidence and applicable law support the ALJ’s decision. Plaintiff’s appeal is therefore denied.

II. Factual and Procedural Background²

On December 1, 2016 Plaintiff applied for disability insurance benefits alleging a disability onset date of August 6, 2015. The Commissioner denied the application initially on April 4, 2017 and on reconsideration on June 21, 2017. AR 88, 98. Plaintiff requested a hearing which was held before an Administrative Law Judge (the “ALJ”) on February 21, 2019. AR 38–86. On May 16, 2019 the ALJ issued a decision denying Plaintiff’s application. AR 17–37. The Appeals Council denied review on April 22, 2020. AR 6–11. On June 23, 2020 Plaintiff filed a complaint in this Court. Doc. 1.

¹ The parties consented to the jurisdiction of a United States Magistrate Judge. *See* Docs. 9 and 10.

² The Court has reviewed the relevant portions of the administrative record including the medical, opinion and testimonial evidence about which the parties are well informed, which will not be exhaustively summarized. Relevant portions will be referenced in the course of the analysis below when relevant to the parties’ arguments.

1 **III. The Disability Standard**

2 Pursuant to 42 U.S.C. §405(g), this court has the authority to review a decision by the
 3 Commissioner denying a claimant disability benefits. “This court may set aside the
 4 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal
 5 error or are not supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180
 6 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the
 7 record that could lead a reasonable mind to accept a conclusion regarding disability status. *See*
 8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). It is more than a scintilla, but less than a
 9 preponderance. *See Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted).

10 When performing this analysis, the court must “consider the entire record as a whole and
 11 may not affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Social*
 12 *Security Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citations and quotations omitted). If the
 13 evidence could reasonably support two conclusions, the court “may not substitute its judgment for
 14 that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112 F.3d 1064, 1066
 15 (9th Cir. 1997) (citation omitted). “[T]he court will not reverse an ALJ’s decision for harmless
 16 error, which exists when it is clear from the record that the ALJ’s error was inconsequential to the
 17 ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

18 To qualify for benefits under the Social Security Act, a plaintiff must establish that
 19 he or she is unable to engage in substantial gainful activity due to a medically
 20 determinable physical or mental impairment that has lasted or can be expected to
 21 last for a continuous period of not less than twelve months. 42 U.S.C. §
 22 1382c(a)(3)(A). An individual shall be considered to have a disability only if . . .
 23 his physical or mental impairment or impairments are of such severity that he is not
 24 only unable to do his previous work, but cannot, considering his age, education, and
 25 work experience, engage in any other kind of substantial gainful work which exists
 26 in the national economy, regardless of whether such work exists in the immediate
 27 area in which he lives, or whether a specific job vacancy exists for him, or whether
 28 he would be hired if he applied for work.

42 U.S.C. §1382c(a)(3)(B).

26 To achieve uniformity in the decision-making process, the Commissioner has established a
 27 sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §§ 416.920(a)-
 28 (f). The ALJ proceeds through the steps and stops upon reaching a dispositive finding that the

1 claimant is or is not disabled. 20 C.F.R. §§ 416.927, 416.929.

2 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in substantial
3 gainful activity during the period of alleged disability, (2) whether the claimant had medically
4 determinable “severe impairments,” (3) whether these impairments meet or are medically
5 equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1, (4)
6 whether the claimant retained the residual functional capacity (“RFC”) to perform past relevant
7 work, and (5) whether the claimant had the ability to perform other jobs existing in significant
8 numbers at the national and regional level. 20 C.F.R. § 416.920(a)-(f). While the Plaintiff bears
9 the burden of proof at steps one through four, the burden shifts to the commissioner at step five to
10 prove that Plaintiff can perform other work in the national economy given her RFC, age, education
11 and work experience. *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014).

12 **IV. The ALJ’s Decision**

13 At step one the ALJ found that Plaintiff had not engaged in substantial gainful activity since
14 her alleged disability onset date of August 6, 2015. AR 22. At step two the ALJ found that Plaintiff
15 had the following severe impairments: generalized anxiety disorder. AR 22–23. The ALJ also
16 determined at step two that Plaintiff had the following non-severe impairments: breast cancer with
17 chemotherapy and residual symptoms of fatigue and weight loss. AR 23. At step three the ALJ
18 found that Plaintiff did not have an impairment or combination thereof that met or medically
19 equaled the severity of one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1.
20 AR 23–25.

21 Prior to step four, the ALJ evaluated Plaintiff’s residual functional capacity (RFC) and
22 concluded that Plaintiff had the RFC to perform a full range of work at all exertional levels with
23 the following non-exertional limitation: no public contact more than 2 hours per day. AR 25–31.

24 At step four the ALJ concluded that Plaintiff could perform her past relevant work as a
25 veterinary technician/animal health manager as actually performed. AR 31–32. Accordingly, the
26 ALJ concluded that Plaintiff was not disabled at any time since her alleged disability onset date of
27 August 6, 2015. AR 32.

1 **V. Issues Presented**

2 Plaintiff asserts one claim of error: that the ALJ erred in formulating the RFC as it is
3 inconsistent with all mental health treating and examining source opinions.

4 **A. Applicable Law**

5 Before proceeding to step four, the ALJ must first determine the claimant's residual
6 functional capacity. *Nowden v. Berryhill*, No. EDCV 17-00584-JEM, 2018 WL 1155971, at *2
7 (C.D. Cal. Mar. 2, 2018). The RFC is "the most [one] can still do despite [his or her] limitations"
8 and represents an assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1),
9 416.945(a)(1). The RFC must consider all of the claimant's impairments, including those that are
10 not severe. 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.
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12 In doing so, the ALJ must determine credibility, resolve conflicts in medical testimony and
13 resolve evidentiary ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039-40 (9th Cir. 1995). "In
14 determining a claimant's RFC, an ALJ must consider all relevant evidence in the record such as
15 medical records, lay evidence and the effects of symptoms, including pain, that are reasonably
16 attributed to a medically determinable impairment." *Robbins*, 466 F.3d at 883. *See also* 20 C.F.R.
17 § 404.1545(a)(3) (residual functional capacity determined based on all relevant medical and other
18 evidence). "The ALJ can meet this burden by setting out a detailed and thorough summary of the
19 facts and conflicting evidence, stating his interpretation thereof, and making findings." *Magallanes*
20 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th
21 Cir. 1986)).
22

23 For applications filed before March 27, 2017, the regulations provide that more weight is
24 generally given to the opinion of treating physicians, which are given controlling weight when well
25 supported by clinical evidence and not inconsistent with other substantial evidence. 20 C.F.R. §
26 404.1527(c)(2); *see also Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), as amended (Apr. 9,
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1 1996) (noting that the opinions of treating physicians, examining physicians, and non-examining
2 physicians are entitled to varying weight in residual functional capacity determinations).

3
4 An ALJ may reject an uncontradicted opinion of a treating or examining physician only for
5 “clear and convincing” reasons. *Lester*, 81 F.3d at 831. In contrast, a contradicted opinion of a
6 treating or examining physician may be rejected for “specific and legitimate” reasons. *Id.* at 830.
7 In either case, the opinions of a treating or examining physician are “not necessarily conclusive as
8 to either the physical condition or the ultimate issue of disability.” *Morgan v. Comm’r of Soc. Sec.*
9 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). Regardless of source, all medical opinions that are not
10 given controlling weight are evaluated using the following factors: examining relationship,
11 treatment relationship, supportability, consistency, and specialization. 20 C.F.R. § 404.1527(c).
12 The opinion of a non-examining physician (such as a state agency physician) may constitute
13 substantial evidence when it is “consistent with independent clinical findings or other evidence in
14 the record.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002).

15
16 Licensed Clinical Social Workers are not “acceptable medical sources.” 20 C.F.R. §
17 404.1513 (2013).³ Rather, they are considered to be “other” medical sources. *Id.*; 20 C.F.R. §
18 404.1513(d)(1) (2013). Unlike the opinions of treating physicians, the opinions of “other” treating
19 sources are not entitled to special weight. 20 C.F.R. § 404.1527(c)(2) and (f)(1). An ALJ may
20 reject the opinions of “other” sources by giving “reasons germane to each witness for doing so.”
21 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012), superseded by regulation on other grounds;
22 *Turner v. Comm’r of Soc. Sec. Admin.*, 613 F.3d 1217, 1224 (9th Cir. 2010). Inconsistency with
23 medical evidence is a germane reason. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).
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26 ³ The Social Security Administration has adopted new rules applicable to claims filed on or after
27 March 27, 2017, which expand the category of acceptable medical providers to include some
28 additional providers not previously included. 20 C.F.R. §§ 404.1502(a)(8) (2017); 416.902(a)(8)
(2017); Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844 (Jan.
18, 2017).

1 **B. Analysis**

2 Plaintiff observes initially that the ALJ rejected all opinions of record in reaching the RFC,
3 including the non-examining state agency physicians' opinions, the opinions of the examining
4 consultants Drs. Bonilla and Seward, and the opinion of the treating therapist LCSW Olson. Br. at
5 7, Doc. 21.
6

7 The non-examining state agency physicians, Drs. Aquino-Caro and Collado, reviewed
8 Plaintiff's file at the initial and reconsideration levels and concluded she had no severe mental
9 impairment. AR 94, 104. The ALJ assigned those opinions little weight because they did not have
10 access to later dated medical evidence, evidence which showed her mental impairment was severe
11 (though ultimately not disabling) in that it affected her ability to work more than minimally. AR
12 29. Adopting the non-examining opinions would have resulted in a non-disability finding at
13 step two. Thus, the ALJ's rejection of those opinions did not disadvantage Plaintiff. Nor did the
14 rejection of those opinions require the ALJ to adopt any of the remaining opinions in whole or in
15 part. In formulating the RFC the ALJ's task is not simply to pick between the opinions in the
16 record. The RFC need not mirror any particular opinion, it is an assessment formulated by the ALJ
17 based on all relevant evidence. *See* 20 C.F.R. §§ 404.1545(a)(3).
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20 Plaintiff attended two psychiatric consultative examinations on March 12, 2017 and April
21 2, 2019 with Drs. Bonilla and Seward, respectively. AR 270; 355. Dr. Bonilla identified diagnoses
22 of unspecified anxiety disorder, adjustment disorder with depressed mood, nicotine abuse in
23 remission, and breast cancer in remission. AR 273. Dr. Bonilla opined that Plaintiff had various
24 mild limitations which are not at issue, as well as moderate limitations in the following areas:
25 detailed and complex tasks; social interaction; handling workplace stress and change. AR 273-74.
26 Dr. Seward identified a diagnosis of generalized anxiety disorder and performed various cognitive
27 and psychological tests. Dr. Seward opined that Plaintiff had a variety of mild limitations which
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1 are not at issue, as well as moderate limitations in the following areas: detailed and complex tasks;
2 maintaining regular attendance; consistent performance of work activities; completing a normal
3 workday/workweek without interruptions from a psychiatric condition; dealing with workplace
4 stress. AR 361–62.

5
6 The ALJ assigned only partial weight to the opinions of Drs. Bonilla and Seward. AR 29.
7 In so concluding, the ALJ noted evidence of Plaintiff’s activities of daily living including driving
8 and handling finances, as well as her average scores on psychometric testing, evidence which
9 demonstrated the ability to perform detailed and complex tasks. AR 29.

10
11 Plaintiff disputes the ALJ’s assertion that Dr. Seward’s opinion was inconsistent with
12 Plaintiff’s average scoring on psychometric testing, which Plaintiff contends is factually inaccurate
13 considering her borderline processing speed and notable difficulty on “Trailmaking B”⁴ which,
14 according to Dr. Seward, suggested she’d have difficulty performing complex tasks at a consistent
15 pace. Br. at 7 (citing AR 358–60).

16 The ALJ’s finding is reasonably supported. The ALJ stated that Plaintiff’s scores on
17 psychometric testing were “generally” in the average range, not entirely in the average range, which
18 was factually accurate. AR 27. Indeed, in the various areas tested between the WAIS-IV and
19 WMS-IV tests, Plaintiff scored high average, average, or low average for all but one: processing
20 speed index (her score corresponded to the 8th percentile). Moreover, Plaintiff’s Full-Scale IQ (of
21 which processing speed index was 1 of 4 components) corresponded to the 42nd percentile. As to
22 the connection between any cognitive deficit and Plaintiff’s anxiety disorder, Dr. Seward stated
23 that the deficits in information processing “may be consistent and resulting from the presences of
24 an anxiety disorder,” not that those deficits definitively or probably were consistent with or
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⁴ The “Trailmaking test” was described as “a measure of general brain function and assesses the presence of possible brain damage” and involves connecting numbers and letters in an ascending sequential order under time constraints. AR 360.

1 resulting from the anxiety disorder. AR 359.

2 Plaintiff also scored below average in “Trailmaking B.” The reference value for a suspicion
3 of neurological impairment was greater than 91 seconds on trailmaking B, and Plaintiff took 151
4 seconds to complete it, corresponding to the 15th percentile. The objective description of the
5 trailmaking test reflects that neurological impairments are “suspected” when the individual exceeds
6 the indicated time limits, not that the test results were definitive for neurological impairments.

7 The ALJ reasonably declined to include mental limitations based on the Trailmaking B
8 score, or based on one borderline score for processing speed among otherwise average cognitive
9 testing. Granted, Dr. Seward certainly possesses expertise in interpreting those test results that the
10 ALJ lacks, expertise presumably brought to bear in reaching his conclusion that Plaintiff had
11 various limitations in mental functioning. Nevertheless, the ALJ is not beholden to such opinions,
12 otherwise uncontested examining opinions would be dispositive as to the functional limitations they
13 identify. The ALJ reasonably rejected Dr. Seward’s identified functional limitations where the
14 results of cognitive testing were generally within the average range save for the two exceptions
15 identified above, and where other evidence in the record was suggestive of adequate mental
16 functioning such as consistently normal mental status examinations, a wide range of activities of
17 daily living, and conservative treatment.

18 Plaintiff disputes the ALJ’s conclusion that her activities of driving and handling finances
19 undermine the opinions of Drs. Seward and Bonilla that she was moderately limited as to detailed
20 and complex tasks. Br. at 8. Plaintiff questions the connection between the cited activities and an
21 ability to perform detailed and complex tasks. As to her driving, the connection is admittedly
22 tenuous. The connection between managing finances and performing detailed/complex tasks is less
23 tenuous. Moreover, driving and handling finances were but two examples of the daily activities
24 the ALJ had previously described in more detail, which included: paying bills, counting change,
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1 handling a savings account, using a checkbook and money orders, attending to personal care,
2 independently, cleaning, vacuuming, doing dishes, doing laundry, shopping, running errands,
3 preparing meals for her family, reading, and caring for a horse.
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5 The ALJ explained that these activities “replicate those necessary for obtaining and
6 maintaining employment.” AR 28. The Court would hesitate going so far considering the step four
7 finding was predicated on Plaintiff’s ability to perform her past work as a veterinary technician as
8 actually performed, which entailed maintaining the health of 900 exotic animals on a private ranch,
9 administering their medications, and supervising nine animal handlers. AR 32. Notwithstanding,
10 the ALJ’s finding was stronger than it needed to be to sustain the decision. Plaintiff’s daily
11 activities were sufficient to undermine the opinions that she has a myriad of moderate mental
12 limitations, even though those activities need not affirmatively establish her ability to return to
13 work. *See Valentine v. Commissioner Social Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009)
14 (upholding an adverse credibility determination where claimant engaged in “gardening and
15 community activities . . . evidence [which] did not suggest Valentine could return to his old job,”
16 but “did suggest that Valentine’s later claims about the severity of his limitations were
17 exaggerated.”).
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20 Task complexity and detail aside, Plaintiff contends the ALJ did not address the remaining
21 moderate limitations identified by Drs. Bonilla and/or Seward, including deficits in concentration,
22 attendance, and coping with workplace stress. Although the ALJ did not overtly address those
23 limitations at the point in the decision where he specifically addressed the examining opinions, the
24 ALJ identified other applicable reasoning earlier in his decision and subsequently incorporated that
25 reasoning by reference when addressing the examining opinions.
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27 For example, at step three the ALJ evaluated Plaintiff’s abilities in four broad functional
28 areas (the paragraph B criteria). As to concentration, persistence and pace, the ALJ found Plaintiff

1 had a mild limitation. AR 24. In so concluding, the ALJ noted as follows: that Plaintiff
2 demonstrated adequate attention and concentration at the consultative examinations, performed a
3 three step command and correctly stated how many quarters are in \$2.25. *Id.*
4

5 Additionally, at step four the ALJ acknowledged that treatment records did show impaired
6 memory and distracted attention beginning in August 2018, but reflected otherwise normal mental
7 status examination findings including normal speech, normal thought process, intact associations,
8 unremarkable thought content, no suicidal or homicidal ideation, intact language, intact fund of
9 knowledge, congruent mood and affect, normal level of consciousness, normal orientation, good
10 hygiene, intact insight and judgment. AR 26 (citing exhibits 2F, 5F, 7F, 9F and 10F).
11

12 The ALJ further noted records reflecting that Plaintiff's condition quickly improved and
13 stabilized with medication. AR 26 (citing Ex. 9F, AR 304-313). Finally, the ALJ noted that
14 Plaintiff's treatment had been routine and conservative, limited to medication prescribed by her
15 primary care physician and counseling with a licensed clinical social worker, with no need for more
16 aggressive treatment such as specialized psychiatric care or hospital admission. AR 28. An
17 impairment for which a claimant receives only conservative treatment is an appropriate reason to
18 reject an opinion that an impairment is disabling. *See Jackson v. Colvin*, No. 2:15-CV-06123
19 (VEB), 2016 WL 5947225, at *5 (C.D. Cal. Oct. 12, 2016), *citing Johnson v. Shalala*, 60 F.3d
20 1428,1434 (9th Cir. 1995)).
21

22 Plaintiff does not acknowledge or dispute the ALJ's broader reasoning in support of the
23 RFC. That reasoning was equally applicable to the ALJ's rejection of the contrary examining
24 opinions. *See Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989) ("As a reviewing court, we
25 are not deprived of our faculties for drawing specific and legitimate inferences from the ALJ's
26 opinion . . . if those inferences are to be drawn.).
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1 Finally, Plaintiff disputes the ALJ's rejection of the opinion of her treating therapist, LCSW
2 Olson, who identified work preclusive limitations in every respect, to wit: 10-15 percent
3 performance preclusion for all 20 out of 20 individual mental abilities; more than 30% daily off
4 task behavior; and more than 5 days per month of absenteeism due to mental health impairments.
5 AR 294–99. Plaintiff disputes the sufficiency of the ALJ's articulated reasoning in that the ALJ
6 dismissed LCSW Olson's opinion as conclusory and inadequately supported by objective medical
7 evidence without citing specific portions of the opinion that were unsupported, or specific portions
8 of the record that undermine the opinion. However, neither the regulations nor controlling law
9 require specific reasoning for rejecting the opinion of an "other" source. Rather, an ALJ may reject
10 the opinions of "other" sources, such as an LCSW, by giving "reasons germane to each witness for
11 doing so." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012), superseded by regulation on
12 other grounds; *Turner v. Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1224 (9th Cir. 2010).

15 Inconsistency with medical evidence is a germane reason for rejecting such an opinion.
16 *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005). In rejecting LCSW Olson's opinion, the
17 ALJ noted that it was based on subjective statements, not objective medical evidence. AR 29. The
18 ALJ also incorporated by reference all applicable reasoning articulated earlier in the decision,
19 including normal mental status examinations, favorable response to conservative treatment, and
20 Plaintiff's activities of daily living. AR 30. The ALJ was not required to repeat the previously
21 articulated reasoning insofar as the ALJ had already identified substantial evidence to support the
22 RFC and identified specific and legitimate reasoning for discounting the examining opinions of
23 Drs. Bonilla and Seward. It follows that the same reasoning justifies rejection of LCSW Olson's
24 opinion, a more extreme opinion to which a less demanding standard applies. *See Valentine v.*
25 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (finding that an ALJ provides germane
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1 reasons for rejecting lay witness testimony when the lay witness's testimony is substantively similar
2 to other subjective testimony that has already been validly rejected.).

3
4 **VI. Conclusion and Order**

5 For the reasons stated above, the Court finds that substantial evidence and applicable law
6 support the ALJ's conclusion that Plaintiff was not disabled. Accordingly, Plaintiff's appeal from
7 the administrative decision of the Commissioner of Social Security is denied. The Clerk of Court
8 is directed to enter judgment in favor of Defendant Kilolo Kijakazi, acting Commissioner of Social
9 Security, and against Plaintiff Kathryn Gilbert.

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12 IT IS SO ORDERED.

13 Dated: August 6, 2022

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE